



BRIEF IN SUPPORT OF PETITION

Statement

The attention of the Court is respectfully invited to the petition which contains a specific statement of the case (Petition, *ante*, pp. 2-4), and the specification of errors now urged (Petition, *ante*, p. 5). For the sake of brevity these statements are not repeated here.

Statutes Involved

The statutes involved are the provisions of the Trading With the Enemy Act of 1917, C. 106, 40 Stat. 411, 50 U. S. C. A., as amended by the First War Powers Act of 1941, C. 593, 55 Stat. 838, 50 U. S. C. A., Appendix, and Executive Order No. 9095, as amended July 6, 1942, by Executive Order No. 9193. Pertinent parts of the statute are annexed to the Appendix herein.

ARGUMENT

The Alien Property Custodian has no authority or power to intervene and dominate the defense in a pending criminal proceeding against a New York corporation whose capital stock he has seized from a citizen of the United States.

The action of the Alien Property Custodian clashes with fundamental concepts of the true administration of American criminal justice and is tantamount to an unwarranted

preclusion of basic rights. From whatever aspect the matter may be viewed, the conclusion is inescapable that there is no reasonable basis to deny to the Chemical Marketing Company, Incorporated, the right to a fair, impartial trial on the issues formulated by the charges against it. If the Alien Property Custodian has the power and authority to appear, plead and dominate the defense to these indictments for the alleged perpetration of criminal acts preceding the date of seizure by him, then the Government is the dominating party of both the prosecution and defense. Moreover, the determination by the Custodian that the corporation has no defense to the charges contained in the indictments, completes the anomalous picture and places the Government in the position of acting as judge, as well as prosecutor and defendant.

If the Alien Property Custodian is legally vested with the broad powers he claims, then the petitioner has no just cause of complaint and, conversely, if he does not have these powers, then the order of the District Court permitting him to intervene and dominate the corporation's defense to the indictments, excluding the former owner (petitioner) from any participation in the case, is clearly erroneous. The basic issue crystallized by the contentions of the litigants to this proceeding, therefore, concerns the nature, scope and extent of the powers vested in the Custodian.

It is well to remember that the petitioner is a naturalized citizen of the United States, and that prior to the vesting order of the Custodian, he was the sole owner of all of the authorized shares of stock of the Chemical Marketing Company, Incorporated, which was organized under the Laws of the State of New York. The transfer of title to all of these shares of stock by the petitioner to the Custodian, was not

a voluntary act on his part and the validity of the vesting order is a matter subject to judicial consideration under the provisions of Section 9(a) of the Trading With the Enemy Act. These facts are stressed solely for the purpose of indicating the nature of the petitioner's status and the extent of his interest and relationship to the corporation. He is affected by the act of the Custodian, because he is individually indicted along with the Chemical Marketing Company, Incorporated, and by reason of the fact that he was President of the corporation during the period covered by the indictments. His individual acts cannot be disassociated from his acts as President.

Since the scope of the powers of the Alien Property Custodian are challenged by the petitioner, the best approach to the construction of his statutory authority requires some examination of the Trading With the Enemy Act of 1917.* This Act was originally adopted as a war measure during the first World War, for the purpose of preventing any trade with, or help to, the enemies of the United States (Sec. 3). It established a regulatory system for control, seizure and administration of enemy owned property and authorized the appointment of an Alien Property Custodian by the President, with power to receive all money and property in the United States, due or belonging to an enemy or ally of an enemy, and to hold, administer and account for same in the manner provided under said Act (Secs. 5, 6, 7). The Custodian was vested with all the powers of a common law trustee with respect to all property conveyed or delivered to him with authority to manage and dispose of same, as though he were the owner thereof.

* Act of October 6, 1917 (C. 106, Sec. 1, 40 Stat. 411) entitled "An Act to define, regulate and punish trading with the enemy and for other purposes.

The property so acquired was to be held subject to the further Act of Congress after termination of the war (Sec. 12).

The authority of the present Custodian is derived from Executive Order No. 9095, March 11, 1942 (7 F. R. 1971), as amended July 6, 1942, by Executive Order No. 9193, which establishes the Office of the Alien Property Custodian and vests in him all the powers of the Trading With the Enemy Act of 1917, as amended by the First War Powers Act of 1941. During the time of war or during any other period of national emergency, the President is authorized to regulate, direct or prohibit any dealing in, or exercising any right with respect to any transaction involving any property in which any foreign country or national thereof has any interest, by any person or with respect to any property, subject to the jurisdiction of the United States, and that any property or interest of any foreign country or national thereof shall vest upon terms directed by the President in such agency or person as may be designated by him, and upon such terms and conditions as the President may prescribe. Such interest or property shall be held, administered, liquidated or sold for the benefit of the United States.

It seems clear that the whole purport and tenor of the Trading With the Enemy Act is to prevent the use of enemy owned or controlled property against the interests of the United States. There is little room to question the constitutionality of this Act or the general seizure powers of the Alien Property Custodian. Property seized by him effects a complete change of title and clothes him with all the rights of ownership subject, however, to the duty to hold such property available for any juristic purpose. His duty is essentially that of a trustee or conservator and requires him

to administer and conserve seized property until the ultimate disposition thereof by the Congress under Sec. 12 of the Act which provides that after the end of the war any claim of an enemy to any property shall be settled as Congress shall direct. In *Woodson v. Deutsche &c. Vormals* (292 U. S. 449, 454), it was stated that "While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during and after the war * * *."

Congress delegated powers of seizure but never intended that the exercise of such authority was to accomplish a confiscation or forfeiture. Seized property is to be held for the benefit of the United States and vests complete title in the Custodian, yet this authority is not unlimited. If, for example, the seizure is erroneous or improper, an aggrieved person has a clear right to reclaim his property by a suit in Equity under Section 9(a) of the Act.* It is also notable that Section 5(b) is operative not only in war time but during any period of national emergency and any confiscation during peace time would undoubtedly violate the Constitution. It is arguable that the Custodian's power to sell, liquidate or sequester seized property implies the power to destroy and indicates confiscatory powers. However, the exercise of such powers would only effect a physical conversion of the property, without accomplishing destruction or dissipation. The power to confiscate is reserved to Congress.**

* *Behn, Meyer & Co. v. Miller*, 266 U. S. 457, 463; *Stoeck v. Wallace*, 255 U. S. 239.

** *Commissioner of Internal Revenue v. Stearns*, 65 F. (2d) 371.

The pattern of the entire Trading With the Enemy Act seems to establish the Alien Property Custodian as a trustee and conservator, and his powers should be construed in that light. His duty is to conserve values so that his administration will not of itself work a confiscation, which, by destroying the fund, would encroach on the power reserved by Congress to return equivalent values at the end of the war or make such other disposition as it deems appropriate. Obviously, by seizing the shares of the Chemical Marketing Company, Incorporated, from the petitioner and entering the plea of *nolo contendere* to the indictments, which is an admission of guilt,* the Custodian has subjected it to fines, penalties and forfeitures which would necessarily destroy the fund it is his duty to conserve.

To be sure, the petitioner, as a citizen of the United States, has a substantive right to contest the seizure of his property (Sec. 9a) but this right avails him but little, if in the interim his property is destroyed or diminished in value as a result of the action taken by the Custodian. The procedure whereby the Custodian was permitted to intervene and dominate the defense foreclosed the petitioner from defending his property. As a result the corporation is left to the tender mercies of the Government which is prosecuting the indictments and predetermining its guilt without benefit of trial by pleading *nolo contendere*. Such action is unwarranted and unjustified under any theory and certainly encroaches on the right to trial by jury. Unless the order permitting the Custodian to dominate the corporation's defense to the indictments is reversed, both the corporation and petitioner will be precluded from pursuing any legal means of defense to the criminal charges.

* *Hudson v. U. S.*, 272 U. S. 41.

The order excluding the petitioner from any further participation in the defense of the charges against his corporation is a mandate which finally disposes of the issue between him and the Alien Property Custodian. The Court undoubtedly has discretionary power to change a plea from not guilty to *nolo contendere* but if the Alien Property Custodian is not vested with the authority to intervene and dominate the corporation's defense, then the Court is without jurisdiction to make the order.

The action of the Alien Property Custodian in the circumstances outlined in this case has received the sanction of the lower courts, despite the protests of the petitioner, who is the real party in interest. The question is of considerable national importance and invites consideration by this Court.

Dated: May 14, 1943.

Respectfully submitted,

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[APPENDIX FOLLOWS]